tions doing business in the State was sustained with regard to two foreign trading corporations. The objections to the tax were: first, that it made no distinction between interstate and intrastate commerce; but the state court had removed this difficulty by construing it as applicable only to corporations engaged in local business in Massachusetts.[15] Second, that it was substantially a tax on property outside the jurisdiction, since it bore no relation to the capital employed in the State; but it was held to be a tax on the privilege of doing business, and so, being lawfully within the taxing power of the State, it might be measured by property which was itself non-taxable.[16] And lastly, it was urged that since the corporations had been established in the State before the statute in question was enacted, they should not be subjected to its discriminatory provisions. In refuting this argument, the court added the logical limitation to the principle suggested by Chief Justice White: that where the business of a foreign corporation within the State is separable from that carried on across its borders, and the property employed in the local business may be removed or diverted to other uses, in short, where the intrastate commerce may be renounced and abandoned without material interference with the interstate commerce nor substantial loss of property to the company, the corporation is not entitled to the equal protection of the laws and stands in no better position than if it were then for the first time seeking admission to the State.

SUITS AGAINST STATE OFFICERS UNDER FOURTEENTH AMENDMENT.—The limitations upon the powers of the States imposed by the Fourteenth Amendment, similar to the other constitutional provisions, affect the fundamental quality of the States as absolute inhibitions.[1] It follows that any act of an individual, although ostensibly the act of the State through its agent, if it is without the scope of its constitutional powers, is in fact incapable of being the act of the legal entity, the State, and is solely that of the individual. A suit against a state officer for an invasion of constitutional rights, therefore, is directed against him as an individual for a wrong committed under color of state authority, and not in the capacity of an agent of the State;[2] and it is immaterial whether his act is sought to be justified under a constitutional or an unconstitutional statute.[3]

Chief Justice Marshall laid down the rule that for a suit to be against the State within the Eleventh Amendment the State must be

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[15]Baltic Mining Co. *v.* Commonwealth (1911) 207 Mass. 381; White Mfg. Co. *v.* Commonwealth (1912) 212 Mass. 35; Att'y. Gen'l. *v.* Elec. Storage Battery Co. (1905) 188 Mass. 239.

[16]*Accord,* Horn Silver Mining Co. *v.* New York (1892) 143 U. S. 305; Home Ins. Co. *v.* New York (1890) 134 U. S. 594; Flint *v.* Stone Tracy Co. (1911) 220 U. S. 107, 162-5; 11 Columbia Law Rev. 474; *contra,* reasoning of court in Western Union Tel. Co. *v.* Kansas, *supra,* p. 30.

[1]Poindexter *v.* Greenhow (1884) 114 U. S. 270. That the State can do acts in violation of the Constitution is the more convenient language of the cases. *Cf. Ex parte* Virginia (1879) 100 U. S. 339.

[2]See United States *v.* Lee (1882) 106 U. S. 196.

[3]Reagan *v.* Farmers' Loan & Trust Co. (1893) 154 U. S. 362.

a party to the record. And this rule, as interpreted by him,[4] is the law today, although expressed in different form.[5] For he recognized that any suit nominally against a state officer in which relief was sought against the State, the State was an indispensable party, according to the ordinary rules of law;[6] consequently, because of the Eleventh Amendment, the federal courts have no jurisdiction to grant the relief. The relevancy of the rule of equity pleading in this regard, however, he emphatically denied; so that a mere substantial interest in the subject-matter of the suit does not make the State an indispensable party.[7] It would seem to follow from the rule of agency that whenever an officer is sued in his official, or representative capacity, he is only a nominal party, and the relief sought is against the State.[8] The federal courts, therefore, have an effective jurisdiction only of those suits which are brought against state officers in their private capacities.[9] Although mandamus lies against the officer, because of his official undertaking, since it is for a failure to act in his representative capacity, the petition is in the nature of a suit against the officer in his private capacity, and is therefore not a suit against the State within the Eleventh Amendment. On principle there seems to be no reason for a denial of this writ compelling the performance of a duty imposed by statute, even though this law was construed as a contract of the State;[10] but any action in equity to compel the specific performance of such a contract is a suit against the State.[11] Although a State can break its contract without redress to the injured parties, if the breach involves any deprivation of property rights, as distinguished from mere contract rights, it is the same as any other taking of property without due process of law, for which relief may be had

[4]The *dicta* in Davis *v.* Gray (1872) 16 Wall. 203, 220, seem never to have been the law. *Cf.* United States *v.* Lee, *supra,* p. 215; 66 Central Law Journ. 71; 41 American Law Rev. 364.

[5]*In re* Ayers (1887) 123 U. S. 443; *cf.* Missouri, etc. Ry. *v.* Missouri Comm'rs. (1901) 183 U. S. 53. The latter case must rest upon the construction of the statute.

[6]Governor of Georgia *v.* Madrazo (1828) 1 Pet. 110.

[7]Osborn *v.* U. S. Bank (1824) 9 Wheat. 738.

[8]Governor of Georgia *v.* Madrazo, *supra.*

[9]It rests, therefore, upon the raising of the constitutional question whether an act is that of the State, and is not dependent upon an actual violation of the limitations imposed upon the state powers. To fall within the inhibition of the Fourteenth Amendment, it must be the act of the state government, for the act of an individual without color of state authority raises no question as to the constitutional power of the State. Barney *v.* City of New York (1904) 193 U. S. 430. It seems that a State may become a party by consent. Clark *v.* Barnard (1882) 108 U. S. 436; *cf.* 8 Columbia Law Rev. 183, 188.

[10]Graham *v.* Folsom (1906) 200 U. S. 248; Board of Liquidation *v.* McComb (1875) 92 U. S. 531; see Woodruff *v.* Trapnall (1850) 10 How. 190.

[11]Murray *v.* Wilson Distilling Co. (1909) 213 U. S. 151. The *dicta* in Antoni *v.* Greenhow (1882) 107 U. S. 769, 783, and Hagood *v.* Southern (1886) 117 U. S. 52, seem an erroneous application of the rule in Louisiana *v.* Jumel (1882) 107 U. S. 711, where the mandamus was denied because there was no duty imposed upon the state officer by law.

against the officers.[12] Thus a contract by the State for the sale of land vests such a property right in the vendee that a breach of the contract would involve the taking of property.[13]

Where title to property is acquired by an officer under color of state authority, the title vests in the State only if the act is within the constitutional powers of a State; but if it is not, the title acquired by the unlawful act can vest only in the wrong-doer as an individual, and a suit for its recovery is not against the State.[14]

The distinction between private and representative acts, however, is most difficult where an officer instigates judicial proceedings. If the duty of bringing suit pertains to his office,[15] it seems that he cannot be enjoined although its performance would break a contract of the State;[16] for the limitation upon a State's power to break its contracts is directed only against legislative action, and the officer, therefore, in so doing within his authority, is not acting in his private capacity, and is, therefore, exempt from suit. If, on the other hand, the right to bring suit is conferred by an unconstitutional statute, an attempt to exercise it is only the act of the individual.[17] Thus in the recent case of *Louisville & Nashville R. R.* v. *Bosworth et al.* (D. C. E. D. Ky. 1913) 209 Fed. 380, in accord with these principles, the court not only enjoined a state board from acting in violation of the Fourteenth Amendment, although the statute under which it purported to act was constitutional, but also restrained the Attorney General from bringing suit, for his right of action could only be derived from the unconstitutional acts of the board.

UNENFORCIBLE RESTRICTIVE COVENANTS IN NEW YORK.—While it is settled that under certain circumstances a change in the character of the neighborhood will, in the discretion of the court, justify a refusal to decree the specific performance of a restrictive covenant,[1] it

[12]Poindexter *v.* Greenhow, *supra;* Allen *v.* Baltimore etc. R. R. (1884) 114 U. S. 311.

[13]Pennoyer *v.* McConnaughy (1891) 140 U. S. 1; Davis *v.* Gray, *supra; cf.* Louisiana *v.* Jumel, *supra.*

[14]Osborn *v.* U. S. Bank, *supra;* Louisiana *v.* Jumel, *supra;* Hopkins *v.* Clemson College (1910) 221 U. S. 636; Tindal *v.* Wesley (1897) 167 U. S. 204; see Cunningham *v.* Macon etc. R. R. (1883) 109 U. S. 446; *cf.* Stanley *v.* Schwalby (1896) 162 U. S. 255. An injunction for the use of an infringing device by officers of the United States has been refused. Belknap *v.* Schild (1895) 161 U. S. 10. This seems justifiable only upon the ground that the continued use of a patent without the consent of the owner is not a taking of property.

[15]See Gunter *v.* Atlantic Coast Line (1906) 200 U. S. 273.

[16]*In re* Ayers, *supra.*

[17]*Ex parte* Young (1908) 209 U. S. 123. Here the court distinguished Fitts *v.* McGhee (1898) 172 U. S. 516, on the ground that the officer in the McGhee case was not a proper party defendant; this seems to nullify the reasoning of that case to the effect that a threatened suit under an unconstitutional statute cannot be enjoined unless this was a duty specially charged by the statute.

[1]Jackson *v.* Stevenson (1892) 156 Mass. 496; Page *v.* Murray (1890) 46 N. J. Eq. 325; note to Brown *v.* Huber (Ohio 1910) 28 L. R. A. [N. S.] 706. The English courts do not accept this doctrine. Pulleyne *v.* France (1913) 57 S. J. 173.